IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.472 OF 2001

Shobha Prabhakar Desai]
Yerawada Central Prison,]
(Female Jail), Pune-411006] ..Appellant
(Ori.Accused)

Vs.

The State of Maharashtra]
(At the instance of]
Kankawali Police Station)]..Respondent

...

Ms. Daksha Shah Advocate (appointed) for Appellant
Mr. A.M.Shringarpure A.P.P. for State

...

CORAM: N.V.DABHOLKAR AND
SMT.V.K.TAHILRAMANI,JJ.

DATE : FEBRUARY 15,2006

ORAL JUDGMENT (PER DABHOLKAR, J.):

1. Additional Sessions Judge, Sawantwadi while concluding the Sessions Case No. 6 of 1992 with judgment dated 6th August, 1992 has held present appellant guilty for offence punishable under Section 302 of Indian Penal Code i.e. committing

murder of husband Prabhakar Desai. She is sentenced to suffer life imprisonment. Being aggrieved by the said finding of guilty, conviction and sentence, the appellant has approached this Court under Section 374(2) of Code of Criminal Procedure, 1973.

2. We have heard and decided several cases wherein bride is the victim and groom is the accused. The reversed order of the roles is unique feature of present case. The prosecution story in brief can be stated as under:

. The incident in question took place on 8th September, 1991. It is not in dispute that appellant is wife of victim Prabhakar and two were residing together at Shirval (Tembvali) Taluka Kankavli, District Sindhudurg. The incident took place at 13.30 hours when the accused is said to have set her husband Prabhakar on fire and thus killed him.

. The prosecution has relied upon story as heard by way of extra judicial confession of the deceased addressed to the Police Patil Vijay Shirvalkar

(P.W.1) and also over-heard by Laxman Patankar (P.W.5) and Vishram Desai (P.W.9) who were accompanying Police Patil when they visited the house of accused on the same day evening at about 7.00 p.m. It is said that deceased was suffering from ‘epileptic fits’. The accused was tired of matrimonial life with him, not only because of his illness but also because of nature of the deceased who was creating quarrels with the villagers on various issues and inviting complaints about himself. At the material time, it is said; deceased suffered one such ‘epileptic fit’. The accused dragged him to the ground from the cot where he was lying. She wrapped his face by using a blanket, poured kerosene on his person and set him on fire.

. It is claim of the prosecution that P.W.6 Swita Desai and P.W.7 Smita Desai who are neighbours of the accused were cleansing utensils in the backdoor of their house. They heard shouts of the accused. In fact, it is the claim of these two witnesses that the shouts were confessional shouts, wherein accused declared to have set herself to her husband on fire. Both these witnesses claimed that they

peeped from the back door of the house. They found deceased lying in a charred condition. They also noticed accused was very much present and she actually slipped to the kitchen room by dropping the match-box.

. P.W.9 Vishram Desai is paternal uncle of the deceased. He was informed by Swita and Smita about the incident when he went to Kankavali and reported the matter to Police Patil P.W.1 Vijay and invited the visit of the Police Patil. It is thus, the Police Patil happened to visit the house late in the evening at about 7.00 p.m. On reference to deposition of Vishram Desai, although he has supported the prosecution, he has turned hostile to the extent of extra judicial confession of the accused heard by him independently, probably, immediately after he was called to the location by P.Ws. 6 and 7 namely;- Swita and Smita. But he has not supported the prosecution by claiming to have heard any independent extra judicial confession by the accused, in absence of Police Patil. After arrival of Police Patil, the criminal law was set in motion by Police Patil reporting the matter to Kankavali Police Station which was

recorded as F.I.R. at 20.30 hours on the same day i.e. 8th September, 1991. Usual proceedings of investigation followed, on completion of which the charge-sheet was filed and after committal, trial ended in conviction.

3. Apart from five witnesses referred during the narration of prosecution story by us i.e a set of Police Patil, P.W.5 Laxman and P.W.9 Vishram and another set of Swita and Smita (P.Ws. 6 and 7), all of whom claimed to have heard extra judicial confession of the accused. There is evidence of seven more witnesses on record. P.W.8 Vasudha Malekar had complained to the accused against the deceased because deceased was seen grazing his cattles in the land of the witnesses. This evidence is aimed at bringing on record the nature of the deceased and as to how life had become miserable to accused because of behaviour of the deceased. Dr.Prakash Tade (P.W.10) is Autopsy Surgeon. He carried out post-mortem on the dead body on 9th September, 1991. By his post mortem report at Exhibit-25, he has recorded cause of the death to be "cardio-respiratory failure due to extensive burns 73%".

. There is a set of three panch witnesses. P.W.2 Pandharinath Rane has attended the proceedings of spot-panchnama (Exhibit-9), Inquest (Exhibit-10) and Seizure of the clothes of accused (Exhibit-11). In fact, P.W.4 Yashwant Sawant is repetition witness because he is panch witness to proceedings of spot panchnama. P.W.3 Govind is a panch witness to a seizure panchnama under which half-pant of the deceased so also silver chain worn around the waist of the deceased, was seized after the post-mortem. Remaining two witnesses P.S.I. Anilkumar Jadhav (P.W.11) and S.D.P.O. Makarand Ranade (P.W.12) are Investigating Officers who have carried out the investigation in part.

4. The accused has not raised any concrete defence but has relied upon bare denial. The statement under Section 313 of Code of Criminal Procedure makes an interesting reading and more particularly, replies to Question Nos.4, 11 and 17. By answering Question No.4 in the affirmative, accused has admitted visit of Police Patil Vijay and P.Ws. Vishram and Laxman to her residence at about 7 or 7.30 p.m. and the three witnesses having noticed existence of charred dead body of Prabhakar inside

the house. By answering in the affirmative to Question No.11, accused stated; "It is true. She complained about it and people were quarrelling with him", in response to the details from the evidence of P.W.8 Vasudha Malekar put to her. The accused has impliedly accepted the evidence of Vasudha and also the accusation of the prosecution that deceased was a trouble-shooter.

. The terminal Question is answered thus:

> . "People used to complain against my husband, over some dispute. I requested him not to quarrel with others, then he used to beat me. He never used to work. He suffered an attack of fit. I do not know how he was burnt. I was present in the house itself".

. It may not be out of place to say that by this reply quoted hereinabove to the terminal Question, the accused has created a difficult task for her own counsel. She has admitted her presence in the house when her husband suffered death, in all probabilities by burning and she has also admitted three reasons for which prosecution has relied upon as motive. The prosecution had impliedly suggested

that accused was motivated to kill husband since her matrimonial life had become miserable because of his nature and health. By reply to Question No.17, the accused has obliged the prosecution by making available a motive as also one circumstance of her presence at the material time.

5. Heard advocate Ms.D.M.Shah for the Appellant and A.P.P. Mr.Shringarpure for the Respondent-State.

. Since it could be seen that prosecution has mainly relied upon two sets of extra judicial confession and circumstantial evidence, one set of extra judicial confession made to P.W.1 Vijay which was also heard by P.W.5 Laxman and P.W.9 Vishram, and another extra judicial confession addressed to Police Patil. Police Patil is an Officer of the Police Department and therefore, this extra judicial confession although heard by couple of individuals who did not belong to Police Department since it was in the presence of and addressed to Police Officer, is not admissible in evidence. This is because of a specific bar created by Section 25 of the Indian Evidence Act. In order to

curtail lengthy arguments and also our judgment, we had conveyed to the lawyers at the beginning of the arguments that the extra judicial confession as deposed to by P.Ws. 1, 5 and 9 as also which peeps from some documents prepared by the Police personnel during the course of investigation such as panchnama of scene of occurrence, would not be relied upon by this Court and therefore, they need not advance any submission on those. We therefore, ignore all references to extra judicial confession that is said to have been heard by Police Patil from the accused.

6. Advocate Ms.Daksha argued that although both Swita and Smita have claimed to have heard confessional shouting of the accused, such story should be rejected by this Court at the touchstone of probability. Ordinarily, nobody should shout a confession, although one may shout for help. She relied upon variances in the evidence of Swita and Smita, she also persisted with the submission that from the backdoor of the house, these two witnesses could not have seen the dead body or burning body and presence of accused by its side. According to her, these two witnesses are therefore, required to

be disbelieved. She submitted that if extra judicial confession as claimed to have been heard by Swita and Smita is ignored, the prosecution case drifts down to a case based on circumstantial evidence and then it does not have circumstances firmly established which will lead to unescapable conclusion that accused has set her husband on fire and committed murder. According to her, the remainder evidence is insufficient to bring home the guilt and accused should be entitled, at least; to benefit of doubt.

. According to learned A.P.P., even if the reply to Question No.17 in the statement under Section 313 of Code of Criminal Procedure is taken into consideration, having accepted her presence at the time her husband suffered death by burning, accused was obliged to explain whether the burning was accidental or homicidal. When it was her turn to speak, she has pleaded ignorance and therefore, the only possible inference is that she has set her husband on fire, being fed up with miserable matrimonial life with him. This is because there is no third member in the family, the accused has not claimed even presence of any third person in

the house at the time of incident.

7. On reference to judgment of the trial Court, submissions of the respective parties are recorded in paragraphs 8 and 9. For the reasons discussed in para 10, the learned Judge has considered the admission of Medical Officer that he cannot say with certainty whether the injuries were ante or post mortem. By relying upon couple of judicial pronouncements, he has expressed belief that Court has powers to form its own opinion, when the Medical Officer is uncertain. It appears that he has relied upon commentary on the subject from some reference book of Medical Jurisprudence and arrived at his own conclusion that injuries were ante mortem and therefore, death was homicidal. We may agree with the observation of the Judge that injuries were ante mortem, for the reasons to be discussed hereinbelow. We may not agree with him to disbelieve the death to be homicidal, merely because injuries were ante-mortem. In order to brand the death to be homicidal, further material would be necessary and mere fact that injuries were ante mortem, would not be sufficient. This is because in all three types of deaths i.e.

accidental, suicidal or homicidal, by burning, the injuries are bound to be ante-mortem.

. So far as the conclusion that injuries were ante mortem, no doubt, in the post mortem notes, the Doctor had not recorded specific observation that injuries were ante mortem. He has also not bifurcated the percentage of burns 73%,according to limbs/organs of the deceased. By this lapse, it cannot be said that the Doctor had not recorded his opinion whether the injuries were ante mortem or post mortem. Post mortem notes (Exhibit-25) record that death was caused because of cardio-respiratory failure due to extensive burns 73% which itself indicates within its womb an observation that injuries were ante mortem. It is unfortunate that Medical Officer during cross-examination got confused and admitted that it was not possible in this case to state whether the injuries are ante mortem or post mortem. The admission is required to be ignored as erroneous admission.

. Certainly Courts can take assistance of other material on record, even for the purpose of arriving at an appropriate conclusion as to nature

of the death, whether accidental, homicidal or suicidal. On reference to panchnama of scene of occurrence (Exhibit-9) and Report of Chemical Analyser (Exhibit-29), it is evident that death is not accidental. It was 1.30 noon, there was no likelihood of chimney or lantern being on. Being a male family member, there was no possibility that he could suffer burn injuries while cooking. Accused has not spoken that husband committed suicide although she spoke about other details regarding behaviour of deceased. Presence of kerosene smell on the flooring all over, presence of blackening of the floor and the wooden loft above the location by smoke, empty kerosene can, empty kerosene lantern and match-box around the victim and presence of kerosene residue also in the wearing apparel of the accused, speak in favour of homicide and not in favour of suicide. It is also not the case of accused that husband tried to commit suicide and therefore, she shouted for help or that she had tried to intervene the attempt for suicide and therefore, her clothes demonstrate kerosene residue.

8. We feel that admission by the Medical Officer

that in this case it cannot be determined whether burn injuries were ante mortem or post mortem, is erroneous. He has opined in the post mortem report itself that injuries were ante mortem and even without reference to books on Medical Jurisprudence by reputed and recognised authors, other circumstances on record enable us to draw a conclusion that the burns were homicidal and therefore, ante mortem.

9. Reliability of evidence of Swita and Smita was seriously challenged by advocate Ms.Daksha Shah. She has relied upon some variance between the evidence of the two. Swita has said that by peeping through the door after hearing shouts of the accused, she saw Prabhakar was burnt and was lying in the room; whereas, Smita has said that Prabhakar was still burning. In fact, in the cross-examination of Smita, it is brought on record that Prabhakar was still burning, is an improvement over her police statement by Smita. If this improvement is ignored then there is no variance between the depositions of Swita and Smita. Variance between two witnesses who claimed to have observed the same situation, can also occur because

of capacity to observe/store and reproduce from the memory. The variance relied upon by learned counsel, therefore, does not pursuade us to say that Swita and Smita are telling lies.

10. A vehement attempt was made by advocate Ms.Shah to point out that these two witnesses are family members of Vishnu and Sahadeo the paternal uncles of the deceased. According to the learned counsel, the paternal uncles were grinding an axe against the accused. This is because prior to her marriage with the deceased, Vishnu and Sahadeo were cultivating the land of deceased and after marriage the accused had taken back possession of the agricultural land. This defence story was put up to both the witnesses but was promptly denied by both of them. The learned trial Judge has appropriately dealt with this defence of enmity in para 19 of the judgment. Apart from failure to produce any documentary evidence such as revenue entries regarding cultivation of the land of accused by Vishnu and Sahadeo, the learned Judge took note of the fact that father of the deceased is still alive and consequently, even if Prabhakar has died, merely putting the accused behind the

bars, will not make the land freely available to Vishnu and Sahadeo.

11. For the reasons in para 18 of the impugned judgment, extra judicial confession by the accused to the Police Patil over-heard by P.W.5 Laxman and P.W.9 Vishram is held inadmissible by the learned Judge. We have already expressed concurrence with this approach and also cutshort arguments if any, on that point.

12. It was one of the contentions on behalf of the appellant-accused before the trial Court as well as before this Court that two female witnesses Swita and Smita could not have seen the occurrence inside the house by standing at the back door of the house. The witnesses have claimed to have seen the things from the door frame of the back-door. This aspect is also dealt with by learned Judge in the later half of paragraph 19 by taking into consideration the description of the location of dead body as found in the spot panchnama (Exhibit-9) and also by relying upon observations during the inspection by himself of the site at the desire of both the parties, the trial Judge has

arrived at a conclusion that the submission of these two female folk not having been able to observe anything that was happening inside the house, is unsustainable. We are unable to agree with the learned counsel for the appellant to deviate from the finding recorded by trial Court on this aspect. Presuming for the sake of arguments that they could not observe exactly what was happening inside the house. Even their evidence certainly proves that there was some shout from the accused, thus accused was inside the house and the husband was lying dead in burnt condition. In fact, we are inclined to draw an inference that these two ladies must not have seen the occurrence only from the door frame or outside the back-door, they could have entered the house to some extent. Such a bold inference is possible in view of the fact that these two are the witnesses who reached the location before any one else. They have informed Vishram about the same, thereafter other relatives gathered and then Vishram proceeded to give an intimation to Police Patil.

. As rightly observed by the learned trial Judge because of reasons on record, evidence of Swita and

Smita cannot be brushed aside. Their presence being neighbours, was most natural, being noon hours, they were cleansing utensils at the back-door after their lunch, is a story which cannot be doubted. They were first to reach location. Their subsequent conduct of giving intimation to other relatives confirms their presence and their having witnessed something. The subsequent conduct as influenced by the fact in issue, is an assurance to their claim that they had heard shouts and they had gone to the location and observed the circumstances there. Once the plea of enmity on land dispute is rejected, they had no reason for giving false evidence against present accused.

. In the light of above nature evidence of Swita and Smita, even if we are to discard their evidence partly, to the extent they claimed that accused raised confessional shouts, still they can be believed to the extent that upon hearing the shouts of the accused, they rushed to the location and after observing situation at the spot, they invited other relatives. In her cross-examination, P.W.6 Swita has admitted that accused also shouted "Dhava

Dhava". Advocate Ms.Shah desired us to draw an inference that this was the shout which is seeking help. Unfortunately, this admission is not supported by the accused in her statement under Section 313 of Code of Criminal Procedure by saying as to how husband caught fire and claim that she had raised cries for help in order to extinguish fire or that she had attempted to extinguish fire. That is why we have ventured to observe earlier that by reply to Question No.17, accused herself has made a task of her own counsel more difficult.

13. To sum up, even ignoring both extra judicial confessions, the circumstances established on record, which can be enlisted as follows, those unerringly point towards the guilt of the accused:

1. Matrimonial life of accused had become miserable because of deceased;

2. Accused and deceased were the only family members;

3. Deceased Prabhakar died by burning;

4. Accused was present in the house;

5. There is no explanation by the accused as to how her husband caught fire, nor there is claim that she attempted to extinguish fire;

6. There are traces of kerosene residue around the location as also on the clothes of the accused;

. The circumstances on record satisfy the parameters of the standard of proof expected in the cases based on circumstantial evidence. We therefore, find that it is not possible to interfere with the finding of guilty as recorded by the trial Court.

14. Appeal therefore, fails and same is dismissed by confirming the impugned judgment and order.

. Registrar (Judicial) shall ensure supply of certified copy of this judgment, free of costs, to the accused, if required through prison

authorities.

. With the conclusion of appeal assignment of Advocate Ms.Daksha Shah comes to an end, we quantify her professional charges at Rs.2500/-.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]